Supreme Court, U.S.
FILED
JAN 14 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1010

In the Supreme Court of the United States

October Term, 1982

CHARLOTTE E. NEUBAUER, personally and as personal representative of the Estate of Clifford S. Neubauer, et al,

Petitioners,

-vs.-

OWENS-CORNING FIBERGLAS CORP., et al,

Respondents.

BRIEF OF EAGLE-PICHER INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

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INTRODUCTION

The only issue presented by these consolidated cases is solely one of state law. That issue is at what date the injury, for purposes of the Wisconsin statute of limitations, occurred for each of the petitioners and their respective claims. Although these actions have been commenced and continued in the District Court for the Eastern District of Wisconsin, the only claims being made by the petitioners are under the tort law of the State of Wisconsin. Consequently, the defendants' and third-party defendants' motions for summary judgment, at the District Court

level, and the appeals to the 7th Circuit concerned only the question of when the Wisconsin statute of limitations began to "run" with respect to the state tort law claims of the petitioners. As noted by the 7th Circuit, the resolution of that issue required only the determination of the date on which the petitioners were "injured" within the context of Wisconsin law. *Neubauer v. Owens-Corning Fiberglas Corp.*, 686 F.2d 570, 572 (1982), Pet. App. A, p. 6A.

On appeal to the 7th Circuit, the respondents herein, with the exception of Owens-Illinois, Inc., asserted that the "date of injury" under Wisconsin law was the date at which the asbestos-related disease was medically diagnosable. Although fully aware of the position of the respondents from the outset, and while arguing against that position in the 7th Circuit, the petitioners did not claim either that position or the Wisconsin law to be constitutionally infirm. The purported constitutional issue set forth in the petition was not raised until the filing of the petition for rehearing in the 7th Circuit.

However, the true objection raised by the petitioners in the petition is neither a constitutional issue nor an issue related to the statute of limitations. It is merely an objection to the burden of proof imposed upon the plaintiff in any personal injury action in Wisconsin where recovery for potential future damage is sought. As will be shown below, the 7th Circuit decision is a correct application of Wisconsin law to this fact situation and does not violate the United States Constitution or the Wisconsin Constitution.

I. ISSUE RAISED BY PETITIONERS IS NOT WITHIN THE CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

A review of the petition makes it readily apparent that the argument presented therein does not address any of the considerations for acceptance of the petition, as set forth in Sup. Ct. R. 17.

While the petitioners now assert that these cases present an issue of constitutional law, they did not advance this argument until this matter had been briefed, argued and decided by both the District Court and the 7th Circuit Court of Appeals. Moreover, even a cursory examination of the petitioners' argument illustrates that, in reality, it is simply an attempt to argue a question of state evidentiary law under the guise of a constitutional issue.

The true basis underlying petitioners' argument is not any purported constitutional infirmity in the statute of limitations of the State of Wisconsin, or its construction by the Wisconsin Supreme Court and the 7th Circuit Court of Appeals, but rather the evidentiary burden of proof imposed by the law of the State of Wisconsin upon all individuals claiming damages for permanent or progressive personal injury.

As the petition presents only a question of state law, which is an issue for the legislature of the State of Wisconsin, *see, e.g., Neubauer,* 686 F.2d at 577, Pet. App. A, p. 30A and *Peterson v. Roloff,* 57 Wis.2d 1, 5-7, 203 N.W. 2d 699, 701-702 (1972), it should not be granted.

II. THE 7TH CIRCUIT CORRECTLY APPLIED WISCONSIN LAW

Under the law of the State of Wisconsin, the statute of limitations begins to run at the time the cause of action

accrues. Sec. 893.14, Wis. Stats. (1977). The Wisconsin Supreme Court has interpreted the accrual of a cause of action to be that time when the tortious conduct has resulted in an injury to the plaintiff. *Holifield v. Setco Industries, Inc.*, 42 Wis.2d 750, 168 N.W.2d 177 (1969). It has been further construed as the date on which both the tortious conduct has occurred and an injury has been sustained by the plaintiff. *Peterson,* 57 Wis.2d at 4, 203 N.W.2d at 700-701.

In the instant action, as the Court of Appeals noted, the only question presented was at what point in time the petitioners had been injured, as that term is defined in the law of the State of Wisconsin. *Neubauer,* 686 F.2d at 572, Pet. App. A, p. 6A. In correctly interpreting and applying Wisconsin law, the Court of Appeals determined that the petitioners' causes of action had accrued, and the injury had occurred, at the time the injury was medically diagnosable, i.e., provable in Court, without regard as to whether or not it was known to the petitioners.

> In the medical malpractice cases decided prior to the enactment of the new discovery rule statute, the Wisconsin Supreme Court stated that the limitations period begins when the injury was diagnosable without regard for any noticeable impairment to the plaintiff. We believe that the Wisconsin Supreme Court would apply that standard here also.

Neubauer, 686 F.2d at 575, Pet. App. A, pp. 21-22A.

A. Wisconsin Statute of Limitations Does Not Require Knowledge of Injury by the Plaintiff

The Wisconsin Supreme Court has frequently been presented with the "date of injury" issue in factual settings where an injury occurred and was provable by competent,

admissible evidence many years before that injury was known to the plaintiff or caused disability or other substantial harm to the plaintiff. *See, e.g., Denzer v. Rouse,* 48 Wis.2d 528, 180 N.W.2d 521 (1970) (Attorney Malpractice); *Milwaukee County v. Schmidt, Garden & Erikson,* 43 Wis.2d 445, 168 N.W.2d 559 (1969) (Architect's Negligence); *Peppas v. Marshall & Ilsley Bank,* 2 Wis.2d 144, 86 N.W.2d 27 (1957) (Negligence of Bank); and *Reistad v. Manz,* 11 Wis.2d 155, 105 N.W.2d 324 (1960) (Medical Malpractice).

In deciding the issue of "date of injury" within that context, the Wisconsin Supreme Court has consistently rejected the "discovery rule" and has held that the "date of injury" does not require that the person be aware of the injury or that it be manifested "objectively."

> That the injury did not become noticeable or was not in fact noticed until a later date is another question . . . Tolling of the statute of limitations in this state does not await the time or fact of discovery. (Citation omitted).

Denzer, 48 Wis.2d at 533, 180 N.W.2d at 524.

> The Court reasoned that, in a proper case, the legislature could have tolled the statute of limitations until such time as the injured party might reasonably have discovered the tort, *but the legislature did not see fit to do so.* (Emphasis supplied).

McCluskey v. Thranow, 31 Wis.2d 245, 250-251, 142 N.W.2d 787, 790 (1966).

Although the Wisconsin Supreme Court has never expressly decided this issue within the context of an asbestos-related disease, its prior decisions, involving analogous fact situations, established that it would apply the same rule of law to these cases.

In *Olson v. St. Croix Memorial Hospital,* 55 Wis.2d 628, 201 N.W.2d 63 (1972), the plaintiff received a transfusion of blood with an improper Rh factor. That transfusion took place in 1962. She was unaware of the fact that the Rh factor she received was improper and suffered no "objective injury" until 1966 when she delivered a child who lived only seven hours. No further "objective injury" occurred until 1969 when she delivered a stillborn child.

In sustaining the trial court's dismissal of the action, which was commenced in 1970, based upon the statute of limitations, the Wisconsin Supreme Court held:

> Under the facts alleged, the first injury occurred in 1962. That injury commenced the period of limitations. Subsequent consequential injuries alleged to have occurred in 1966 had no effect on the cause of action already accrued.

Olson, 55 Wis.2d at 633-634, 201 N.W.2d at 65.

The Wisconsin Supreme Court has recently addressed this rule of law in *Rod v. Farrell,* 96 Wis.2d 349, 291 N.W.2d 568 (1980). Therein the plaintiff underwent surgery in 1955 for repair of a congenital hernia at which time, unknown to anyone, a portion of his vasa was removed. In 1975, it was discovered that plaintiff was sterile as a result of the removal of his vasa during the 1955 surgery. In 1976, he commenced a medical malpractice action against the physician who performed the surgery. The Wisconsin Supreme Court again sustained the dismissal of the action due to the expiration of the Wisconsin statute of limitations prior to the commencement of the action in 1976.

Similar results have also been reached in *McCluskey v. Thranow, supra,* where the plaintiff learned in 1962

that a hemostat had been left in his body during a surgical procedure performed in 1955, and in *Peterson v. Roloff, supra,* where the plaintiff learned in 1971 that a 1954 gallbladder operation had not been properly performed and that gauze had been left in her body at that time.

B. 7th Circuit Decision is Consistent With and Mandated by Wisconsin Law

On appeal, the 7th Circuit in the instant action was presented with arguments which asserted three separate standards by which the "date of injury" was to be determined. The first was the date of exposure to asbestos fiber, urged by Owens-Illinois, Inc., which was premised on the proposition that any inhalation of asbestos fiber causes injury to the lungs. The second standard was the date the asbestos-related disease became medically diagnosable, urged by all respondents other than Owens-Illinois, Inc., since at that point in time a physician could diagnose the disease and the plaintiff could prove injury and damage as a result of the exposure to asbestos. The third standard, forwarded by petitioners, was the time at which each plaintiff actually discovered he or she had asbestos-related disease or was physically impaired thereby.

In resolving the issue, the 7th Circuit adopted the only standard supportable by the law of Wisconsin — the date the asbestos-related disease was medically diagnosable. Although on petition for rehearing, the petitioner appeared to argue that the 7th Circuit decision misapplied Wisconsin law, it is clear that they no longer make that argument.

The decisions of the Wisconsin Supreme Court in virtually identical fact situations allow no conclusion other than that reached by the 7th Circuit.

III. WISCONSIN STATUTE OF LIMITATIONS NEITHER DEPRIVES PETITIONERS OF A REMEDY AT LAW NOR OF DUE PROCESS

Utilizing the date the asbestos-related disease becomes medically diagnosable, neither deprives the petitioners of property without due process of law nor deprives them of a remedy for a wrong under Art. I, sec. 9 of the Wisconsin Constitution. Petitioners argue, in essence, that the mere existence of a statute of limitations is unconstitutional. They begin with the proposition that as of the date of diagnosis, they had no provable disability. (Pet. pp. 25-26). Petitioners then argue that only when physical impairment from the disease has manifested itself does a plaintiff have "sufficient" proof of damages. Petitioners then assert that allowing the statute of limitations to commence running before that date is unconstitutional.

The flawed reasoning of petitioners' argument is readily apparent. For example, they have not seen fit to define "disability or impairment," but with good reason. Most, if not all, of the testimony as to the dates the petitioners' asbestos-related disease was medically diagnosable is based upon dysfunction or impairment determined as a result of medical examination and testing. Even if that dysfunction or impairment does not prevent a petitioner from pursuing his normal trade or occupation, does it not constitute a disability?

The most serious flaw in petitioners' reasoning occurs at the start of this sequence, however. Petitioners have overlooked the fact that, under Wisconsin law, at the time the injury occurs to one's body, and is medically diagnosable, damage has occurred. Petitioners have consistently ignored the distinction between injury as damage and the extent of injury as the extent of damage. Once that dis-

tinction is made, and it must be made under Wisconsin law, it is readily apparent that they are not deprived of either due process or a remedy at law.

A. A Statute of Limitations is a Matter of Legislative Policy

Both this Court and the Wisconsin Supreme Court have recognized that a statute of limitations involves the resolution of two competing considerations.

> These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, . . . (Citations omitted).

United States v. Kubrick, 444 U.S. 111, 117 (1979).

> Two conflicting policies confront each other when statutes of limitations are presented: (1) That of discouraging stale and fraudulent claims, and (2) that of allowing meritorious claimants, who have been as diligent as possible, an opportunity to seek redress for injuries sustained. (Citations omitted).

Peterson, 57 Wis.2d at 6, 203 N.W.2d at 702.

Both Courts have similarly recognized that the resolution of these considerations is a questtion of legislative policy.

> Statutes of limitations, . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." (Citation omitted).

Kubrick, 444 U.S. at 117.

> But whatever may have been the reasons that induced the enactment of the statute of 1885, the period within which actions must be brought was a matter resting primarily with the legislative department of the state government; and as statutes of limitation have for their object, and are deemed necessary to, the repose and security of society, the determination of that department should not be interfered with by the courts, unless the time allowed to bring suits upon existing causes of action is, in view of all the circumstances, so short as not to give parties affected by it a reasonable opportunity to protect their rights under the new law.

Wheeler v. Jackson, 137 U.S. 245, 256 (1890).

> The question of what the statute of limitations should be as to any cause of action is a question of public policy. . . .
>
> We conclude that this is a matter peculiarly for legislative determination.

Peterson, 57 Wis.2d at 6-7, 203 N.W.2d at 702.

Although expressed in somewhat different language, both Courts have recognized the legislature's prerogative in this area, subject only to applicable constitutional limitations. Both Courts have expressed the constitutional standard in essentially identical form. Compare *Wheeler, supra,* with *Bekkedal v. Viroqua,* 183 Wis. 176, 196 N.W. 879 (1924), wherein the Wisconsin Supreme Court stated the standard as:

> . . . statutes of limitation are not subject to constitutional objections if a reasonable time within which the remedy may be invoked is provided by the statute. (Citations omitted).

Id. at 185, 196 N.W. at 882.

Before addressing the particular facts presented by these cases, two factors should be noted.

First, the 7th Circuit took note in its decision of two considerations critical to that decision. First, it pointed out that it would be "unfair" to hold that the period of limitations began to "run" before the plaintiff could possibly prove a cause of action. Secondly, the 7th Circuit noted that the Wisconsin Constitution, specifically Art. I, sec. 9, may prevent a statute of limitations from being construed so as to terminate the plaintiff's right to sue prior to the time plaintiff could prove the existence of an injury. *Neubauer,* 686 F.2d at 573, Pet. App. A, pp. 13-14A. Petitioners argue that, after noting those crucial considerations, the 7th Circuit then issued a decision which violated both.

Secondly, the Wisconsin Supreme Court has evaluated and rejected, on several occasions, the arguments made by petitioners herein.

In *Rod vs. Farrell, supra,* the plaintiff argued, as petitioners do here, that the Wisconsin statute of limitations deprived him of due process and violated Art. I, sec. 9 of the Wisconsin Constitution.

In rejecting the argument referrable to the Wisconsin Constitution, the Wisconsin Supreme Court held:

> This court has said that although Art. I, sec. 9, Wisconsin Constitution, guarantees a suitor a day in court of competent jurisdiction to which he may present his claim, the statute of limitations may bar a plaintiff's action and the defending party may rely on the statutory bar. (Citations omitted).

Id. at 355-56, 291 N.W.2d at 571.

> In the instant case, however, the plaintiff's injury occurred at the time of the operation. Many years have elapsed before the statute of limitations barred plaintiff's claim. Consequently, we conclude that the

> statute of limitations does not violate Art. I, sec. 9, Wisconsin Constitution.

Id. at 356, 291 N.W.2d at 571. *See also, Reistad v. Manz,* 11 Wis.2d 155, 105 N.W.2d 324 (1960).

In rejecting the argument that the Wisconsin statute of limitations denies the plaintiff due process as guaranteed by the United States Constitution, the Wisconsin Supreme Court relied, in part, upon *Clark v. Gulesian,* 429 F.2d 405 (1st Cir. 1970). In *Clark,* the plaintiff argued that the Maine statute of limitations, which began to "run" at the time of the negligent act, deprived him of due process. The 1st Circuit, in rejecting that position, noted that the result may be unfortunate for that particular plaintiff but:

> . . . the state may reasonably recognize that a defendant has an interest in repose, and in the avoidance of stale claims, however free from fault the claimant's delay may be. *Such a conclusion does not deprive the plaintiff of any constitutional right to fair or equal treatment.* (Emphasis supplied).

Id. at 406.

The Wisconsin Supreme Court similarly rejected the denial of due process argument stating:

> This argument is similar to the one made under Art. I, sec. 9 of the State Constitution, and we find it similarly unpersuasive.

Rod, 96 Wis.2d at 357, 291 N.W.2d at 572.

B. Wisconsin Statute of Limitations is Constitutional

The standard applied to these cases by the 7th Circuit, as mandated by Wisconsin law, is that at the time the petitioners' asbestos-related disease was medically diagnos-

able their respective causes of action had accrued and the applicable statute of limitations began to "run."

At the point in time the asbestos-related disease was medically diagnosable, the petitioners had, not only injury and damage, but also *proof* of that injury and damage. The petitioners then had *three years* within which to commence their actions before the statute of limitations expired. Sec. 893.205(1) and (2), Wis. Stats. (1977). The legislative decision to require the commencement of suit within three years of the date of the occurrence of personal injury or death is not, by any stretch of the imagination, unreasonable.

Petitioners, in fact, do not argue that the three year time period is unreasonable. Instead they argue that they should not be required to start suit when they are, or were, first injured. That position is based upon their assertion that the injury, at least at first, may not be causing actual physical impairment (Pet. p. 23), i.e. the potential dollar value of the present and past damages at that time may not be large. They then ask this Court to create an exception in the law of Wisconsin for them. Specifically they ask that the Wisconsin statute of limitations, as applied to them, not start to run until they have sustained manifested "physical impairment" (Pet. p. 29), presumably so that the potential dollar value of their present and past damages will be increased.

The petitioners attempt to justify this position by arguing that if they are required to start suit when their injury or damage is first medically diagnosable, they may be unsuccessful in proving to a jury that their injury and damage may progress and cause additional injury and damage in the future. (Pet. pp. 23-25). Yet this same potential

result confronts every plaintiff with a progressive or permanent personal injury claim in Wisconsin. Every plaintiff who seeks recovery for alleged future consequences of an injury must prove the consequences alleged by a preponderance of the evidence. *Sufferly v. Heyl & Patterson,* 139 Wis. 510, 121 N.W. 251 (1909). The law, as applied to these petitioners, is no different than the law applied to all other personal injury claimants in Wisconsin.

The petitioners also ignore the fact that even if their standard were adopted, they are confronted with the same evidentiary burden. The petitioners herein have alleged future damages, and, even if their actions were allowed to proceed, they would face the same uncertainty with respect to their claims for future damages. The fact that a plaintiff does or does not have "manifest physical impairment," whatever petitioners intend that to mean, has no effect whatsoever on the evidentiary burden faced by the plaintiff in proving future damages.

The suggestion that allowing the petitioners to delay suit until they have a "manifest physical impairment" will somehow ensure or more readily enable them to recover for alleged future damage is a false premise for a non-existent constitutional argument.

That situation is further aggravated in that, as noted previously, the petitioners have not defined what would constitute "manifest physical impairment," apparently wishing to reserve to themselves the decision as to when the damages are of sufficient value to activate the statute of limitations. Such a result would violate the considerations involved in establishing the statute of limitations as recognized by both this Court and the Wisconsin Supreme Court.

The 2nd Circuit Court of Appeals has recently rejected an argument similar to petitioners under even more aggravated circumstances. *Ornstein v. Regan, et al,* 604 F.2d 212 (2nd Cir. 1979). Ornstein sustained an injury during the course of his employment for the Board of Education for the City of New York. Upon learning those injuries permanently disabled him, he filed an application for retirement based upon permanent disability. That application was denied in that the rules and regulations of the Retirement System required that such an application be filed within two years of the happening of the accident which had not been done. The plaintiff argued that since he did not know he was permanently disabled within two years of the happening of the accident, the two year time limitation should run from the date he learned he was permanently disabled. When the courts of the State of New York sustained the position of the Board of Education, he commenced this action alleging the application of that limitation was unconstitutional as it deprived him of due process of law.

In rejecting that argument, the 2nd Circuit held:

> Limitation periods are designed to eliminate stale claims. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable (sic) and unavoidable delay. They sometimes expire before a claimant has sustained any injury, or before he knows that he has sustained an injury. (Citations omitted).

Id. at 214.

The 2nd Circuit specifically held that periods of limitation are not unconstitutional merely because they create seemingly unfair results in certain instances.

> The legislative body which enacts the limiting legislation may avoid unfair results by incorporating ap-

> propriate tolling provisions. Its failure to do so does not make the limitation unconstitutional. (Citation omitted).

Id. at 214.

As recognized by the 7th Circuit, at the time the asbestos-related disease is medically diagnosable, the plaintiff *can* prove a cause of action, including injury and damage. The petitioners' argument ignores the fact that once the disease is medically diagnosable, injury and damage have occurred. While the extent of injury in any given plaintiff at that point in time may vary, there is nevertheless an injury, damage and an accrued cause of action: there is a claim capable of present enforcement, a suable party against whom it may be enforced and a party who has a present right to enforce it. This is the objective standard established in Wisconsin law for determining when the statute of limitations begins to "run." *Barry v. Minahan,* 127 Wis. 570, 573, 107 N.W. 448, 490 (1907).

In this context, it is apparent that the crux of the petitioners' argument simply goes to the extent of damage which may be proven at that date. While the disease may subsequently produce further injury and damage, this is simply a consequence of the disease and it has absolutely no effect or bearing on the date of injury determination. *See, e.g., Olson,* 55 Wis.2d at 633-34, 201 N.W.2d at 65. As *Olson* illustrates, this evidentiary issue is not unique to asbestos-related diseases but is one faced by all plaintiffs who are suing for personal injuries and potential future damages.

The argument presented in the petition is manifestly unsound. In effect, the petitioners are asking that they be the ones to determine at what point in time the statute of limitations begins to run, a proposal which is unrea-

sonable, unworkable and unfair. The evidentiary burden and subsequent trial uncertainty, which is the base of the petitioners' argument, is confronted by all plaintiffs in personal injury actions seeking recovery for potential future damages. The petitioners have not explained, and indeed cannot, why they should be excepted from this burden and uncertainty. In fact, as noted previously, most of the petitioners in these consolidated cases continue to face that evidentiary burden and trial uncertainty set forth in the petition. Accepting their view of the statute of limitations would not, as suggested in the petition, relieve them of that evidentiary burden and subsequent trial uncertainty.

C. 7th Circuit Correctly Disregarded Authority From Other Jurisdictions

Petitioners' final argument is that the 7th Circuit should have adopted the view of the 8th Circuit in *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155 (1975). In its decision in *Karjala,* the 8th Circuit specifically noted it was governed by Minnesota law and was relying on Minnesota law in reaching its conclusion. *Id.* at 160. The 7th Circuit properly relied on Wisconsin law in making its determination in this case, which reliance was mandated by *Erie Railroad v. Tompkins,* 304 U.S. 64 (1958).

The well-reasoned decision of the 7th Circuit Court of Appeals was obviously made after a lengthy and thorough consideration of the issue which was presented to it and the applicable Wisconsin law. The decision applies Wisconsin law in the same manner as it has been consistently applied by the Wisconsin Supreme Court. The decision of the 7th Circuit does not require these petitioners, or any

other person, to start litigation before a cause of action has accrued and does not force petitioners, or any other person, to start suit before they have a provable cause of action.

CONCLUSION

The petition for a writ of certiorari does not present an issue which warrants the granting of the writ.

The issue presented is purely one of state law and the 7th Circuit Court of Appeals has correctly applied the law of the State of Wisconsin in these consolidated cases.

The petitioners contend that the 7th Circuit Court of Appeals' decision requires them to commence suit at such a time that it violates Art. I, sec. 9 of the Wisconsin Constitution and deprives them of due process under the United States Constitution. However, an examination of the law of the State of Wisconsin and the decision of the 7th Circuit demonstrates that the decision of the 7th Circuit Court of Appeals herein does *not* require the petitioners to commence suit until such time as they have medically diagnosable, and therefore provable, injury and damage, and does not require them to commence an action until such time as they can plead and prove a cause of action. From that point in time, three years are allowed by Wisconsin statute to commence litigation.

The respondent respectfully submits that, as previously determined by the Wisconsin Supreme Court, the Wisconsin statute of limitations does not violate Art. I, sec. 9 of

the Wisconsin Constitution or deprive the petitioners of due process under the United States Constitution. Respondent, therefore, respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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